UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NATIONAL TPS ALLIANCE, et al., Plaintiffs, v. KRISTI NOEM, et al., Defendants.	Case No. 25-cv-01766-EMC (SK) **ORDER REGARDING DELIBERATIVE PROCESS PRIVILEGE** Regarding Docket Nos. 159, 177

Plaintiffs seek an order requiring Defendants to produce documents that Defendants have withheld on the basis of the deliberative process privilege and attorney-client privilege. For the reasons set forth below, the Undersigned GRANTS IN PART and DENIES IN PART Plaintiffs' motion.

A. Background

Within her first month as Secretary of the Department of Homeland Security, Kristi Noem altered the Temporary Protected Status ("TPS") designations for Venezuela and Haiti so as to deprive over one million individuals of the right to live and work legally in the United States. (Dkt. No. 74, ¶¶ 1-3.) On February 19, 2025, Plaintiffs filed the instant action, alleging that Secretary Noem's designations regarding TPS for Venezuela and Haiti were motivated by racial and national-origin animus and thus violate the Fifth Amendment and the Administrative Procedure Act. (Dkt. Nos. 1, 74.)

On March 31, 2025, the District Court granted Plaintiffs' motion to postpone Secretary Noem's TPS designations. (Dkt. No. 93.) In doing so, the District Court concluded that Secretary Noem's "actions appear predicated on negative stereotypes casting class-wide aspersions on their character" and that Plaintiffs "will likely succeed in demonstrating that the actions taken by the Secretary are . . . motivated by unconstitutional animus." (Dkt. No. 93, p. 2-

3.) The District Court relied on the following evidence of discriminatory motivation:

- Secretary Noem "made sweeping negative generalizations about Venezuelan TPS beneficiaries," such as "Venezuela didn't send us their best. They emptied their prisons and sent criminals to America," "the people of this country want these dirt bags out," and "Venezuela purposely emptied out their prisons, emptied out their mental health facilities and sent them to the United States of America." (*Id.* at pp. 64-66.) Many of these statements directly related to TPS policy and were made in close proximity to Secretary Noem's TPS designations. (*Id.* at pp. 69-70.)
- President Donald J. Trump made similar discriminatory statements, including "they took the criminals out of Caracas and they put them along your border," Haitian immigrants (and TPS holders) are "eating the pets of the people that live" in Springfield, Ohio, and "we will put these vicious and bloodthirsty criminals in jail." (*Id.* at pp. 66-69.) Like Secretary Noem's statements, many of President Trump's statements were directly connected to the TPS designations. (*Id.* at pp. 69-70.)
- The first Trump Administration established a pattern of targeting non-white, non-European TPS holders. (*Id.* at p. 72.)
- Secretary Noem's decision-making process was clearly anomalous in its speed and lack of consultation from constituent agencies. (*Id.*) The Secretary's decision to vacate existing TPS was unprecedented in the 35 years of the TPS program. (*Id.* at 72-73.)
- The TPS designations lacked legal and evidentiary support. (*Id.* at pp. 73-75.) For example, Secretary Noem's justifications were based on "[g]eneralization of criminality to the Venezuelan TPS population as a whole," which "is baseless and smacks of racism predicated on generalized false stereotypes." (*Id.* at 73.)

Although the Supreme Court stayed the District Court's postponement order, litigation on the merits proceeds. (Dkt. No. 143.) Plaintiffs pursued limited discovery related to a motion for summary judgment, which is set for hearing on July 11, 2025. (Dkt. No. 165.) The instant dispute centers on Defendants' withholding or redacting of documents based on the deliberative process privilege and the attorney-client privilege. (Dkt. No. 159.) The District Court referred this case to the Undersigned for the purposes of discovery and ordered the parties to agree to and submit 20-25

bellwether documents for in camera review. (Dkt. Nos. 161, 164.) The parties submitted the bellwether documents and supporting briefing on June 4, 2025. (Dkt. No. 177.)

B. Deliberative Process Privilege

The deliberative process privilege is a qualified privilege under federal law. *FTC v. Warner Comm'n, Inc*., 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam). To qualify for the privilege, a document "must be predecisional—it must have been generated before the adoption of an agency's policy or decision." *Id*. In addition, a document must be "deliberative in nature, containing opinions, recommendations, or advice about agency policies." *Id*. Plaintiffs argue that the deliberative process privilege does not apply because Defendants failed to provide sufficient support to show that the documents are deliberative in nature. After in camera review of the bellwether documents, the Undersigned finds that the documents designated under the deliberative process privilege qualify for that privilege. In addition, Defendants provided declarations showing that the documents in question are deliberative in nature. (Dkt. Nos. 177-3, 1770-4.)

However, the deliberative process privilege is not absolute. *Id.* "A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure. *Id.* "Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.*

Because Defendants have not argued for a "granular analysis," the Undersigned addresses the documents collectively. *See Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (per curiam). After examining the *Warner* factors, the Undersigned finds that applying the qualified deliberative process privilege is not warranted here.

1. Relevance

First, the withheld documents are relevant to Plaintiffs' allegations of discriminatory motivations for the TPS designations. Plaintiffs contend that Defendants provided one reason for the TPS designations, but in fact, relied upon other invalid reasons for those decisions. To determine if Plaintiffs are correct, the decision-maker will need to examine Defendants'

deliberative process. Defendants' pleas that Plaintiffs' requests for production are a "fishing expedition" are unpersuasive. As previously explained, the District Court has already found support—including from the decisionmakers' own comments—for Plaintiffs allegations of racial animus and national-origin animus. Given the discriminatory statements, discriminatory history, anomalous process, and lack of justification associated with the TPS designations, Plaintiffs' requests for decisional materials are far from speculative.

In considering the relevance of the evidence, courts may also consider the seriousness of the issues and litigation, the presence of issues concerning alleged misconduct by the government, the interest of the litigant and society in accurate fact finding by the courts, and the federal interest in enforcement of the law. *North Pacifica LLC v. City of Pacifica*, 274 F.Supp.2d 1118, (N.D. Cal. 2003) (internal citation omitted). Those considerations also weigh heavily in support of Plaintiffs. The issues at stake in this litigation could not be more serious—the immigration status, livelihoods, and security of over one million individuals who have rebuilt their lives in the United States after fleeing humanitarian crises. Governmental conduct is squarely at issue here, where Plaintiffs have credibly alleged that racial and national-origin animus led to the decisions at issue. Consequently, society has a strong interest in accurate fact finding where the propriety of government decision making is at issue. Enforcement of the law is not a central issue for either party.

2. Availability of Other Evidence and Government's Role in Litigation

There is no dispute that the second and third factors favor Plaintiffs. (*See* Dkt. No. 177, p. 6 (Defendants conceding that the second and third factors "inure to Plaintiffs' favor").) "The evidence sought is primarily, if not exclusively, under Defendants' control, and the government—the Executive—is a party to and the focus of the litigation." *See Karnoski*, 926 F.3d at 1206.

3. Extent to Which Disclosure Would Hinder Future Discussions

As for the fourth factor—the potential chilling effect on frank government deliberations—"the disclosure of some types of documents will be less likely to cause embarrassment or chilling than others." *Desert Survivors v. US Dep't of the Interior*, 231 F. Supp. 3d 368, 385 (N.D. Cal. 2017). The disclosure of "preliminary drafts" is "not likely to chill speech," because "these are

relatively polished drafts, and the recreation of the decisionmaking process should in no way embarrass the agencies." *Id.* (citation omitted). Disclosure of "preliminary staff views or tentative opinions" might chill speech because they "represent the give-and-take of the agencies' internal deliberations, and their disclosure would discourage such deliberations." *Id.* (citation omitted).

Here, Defendants argue that many of the documents contain disagreements and explanations, whose disclosure would chill frank discussions in the future given that the subject matter involves "public controversy." (Dkt. No. 177, p. 7.) Defendants offer evidence that disclosure of the documents "would jeopardize DHS's ability to engage in decision-making by discouraging future candid discussion and debate within the government." (Dkt. No. 177-4 (Declaration of Robert Law, Senior Counselor to the Secretary, U.S. Department of Homeland Security).) Law further posits that "DHS and other government personnel would be reluctant to share their opinions for or against a particular decision if those pre-decisional comments were subject to disclosure" and that "it is imperative to protect the open and honest exchange of ideas and opinions among DHS employees . . . to assist final decisionmakers in ensuring that DHS's mission of protecting the United States is faithfully executed." (*Id.*) Finally, Law argues that release of the documents in question would particularly chill discussion because the documents concern "approaches to the government's immigration enforcement that are the subject of public controversy." (*Id.*) Other evidence that Defendants submit echoes these concerns in identical terms. (Dkt. No. 177-3 (Declaration of Kika Scott, Acting Deputy Director, U.S. Citizenship and Immigration Services).)

Defendants' argument about chilling future discussions applies to any case in which a party asserts the deliberative process privilege. If courts were to accept this explanation to override any attempt to obtain documents otherwise shielded by the deliberative process privilege, then the deliberative process privilege would be absolute. However, the government's interest in frank communication is "not insurmountable." *Karnoski*, 926 F.3d at 1206. Here, the arguments in support of nondisclosure are particularly weak. Defendants have not explained specifically how disclosure of the documents in question "would cause embarrassment on the part of the author or give rise to confusion on the part of the public." *Desert Survivors v. US Dep't of the Interior*, No.

16-CV-01165-JCS, 2017 WL 1549373, at *7 (N.D. Cal. May 1, 2017). Instead, Defendants' statements are general in nature. The only specific argument that Defendants make is that the issue in this case is "the subject of public controversy." Again, this argument could apply to any situation in which a party seeks documents otherwise protected by the deliberative process privilege, and that the subject matter is controversial shows that the information is serious and relevant, as discussed in the analysis of factor one above.

Defendants previously raised the same deliberative process argument in *Ramos et al. v. Nielsen et al.*, No. 18-cv-01554-EMC, in connection with materials related to TPS designations during the first Trump administration. (*Ramos et al v. Nielsen et al*, No. 18-cv-01554-EMC, Dkt. Nos. 61, 62, 73.) In that case, Defendants contended that disclosure would chill internal preparation for meetings and congressional hearings. (*Id.* at Dkt. No. 73.) Both the Undersigned and the District Court rejected that argument. (*Id.* at Dkt. Nos. 63, 79, 84.) As a result, "[t]he government produced thousands of documents, including a significant number of drafts, emails, and other deliberative materials." *Ramos v. Wolf*, 975 F.3d 872, 884 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 59 F.4th 1010 (9th Cir. 2023). There is no indication that these disclosures had any chilling effect on future deliberations. To the contrary, the existence of deliberative materials in the present case suggests that the prior disclosures did not materially inhibit the government's ability to engage in candid internal discussions.

4. Balancing of Factors

Defendants do not provide any analysis for balancing the factors and do not explain why the Plaintiffs' need for the materials and the need for accurate fact-finding overrides Defendants' interest in non-disclosure. Here, the balance tips in favor of Plaintiffs, as, in these circumstances, applying the deliberative process privilege to protect disclosure of materials from Defendants is not warranted. Plaintiffs cannot obtain this evidence in any other manner, and their arguments have support in evidence. Their need for this evidence on this important topic outweighs the potential chilling effect on future discussions.

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C. Attorney-Client Privilege

1. Bellwether Documents

Among the 25 bellwether documents submitted for in camera review, it is clear that some fall within the attorney-client privilege. Those documents are bates labeled as NTPSA_USCIS_00000086, 00000157, 00000173, 00000239, 00000317, 00000522, and 00001618.

Defendants also claim the protection of the attorney-client privilege for additional documents: NTPSA_USCIS_00000401, 00000419, 00001473, 00001471. However, Defendants' privilege log with regard to those documents is insufficient to assess whether each document's designation as privileged is justified. To the extent that Defendants continue to assert the attorney-client privilege for documents other than the ones listed above, Defendants SHALL produce an amended privilege log that complies with the Undersigned's standing order on or before June 10, 2025.

2. Privilege Log in General

In general, Plaintiffs allege that Defendants have withheld documents without properly identifying the basis for attorney-client privilege. For example, Defendants claim privilege for 194 documents without identifying an author/sender and recipient. Defendants bear the burden to show that the attorney-client privilege protects a document from disclosure. *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009). Defendants cannot carry this burden if they fail to identify the author/sender and recipient.

D. Conclusion

The Undersigned GRANTS Plaintiffs' motion to compel production of responsive documents withheld on the basis of the deliberative process privilege. The Undersigned ORDERS Defendants to produce documents for which Defendants claim only the deliberative process privilege by June 13, 2025. Defendants are not required to produce the bellwether documents described above that the attorney-client privilege protects.

Those Undersigned reserves ruling on those documents which (1) were not included by the bellwether documents, and (2) purportedly fall within the attorney-client privilege. The Undersigned ORDERS Defendants to produce a privilege log for those documents, in compliance

with the Standing Order, by June 13, 2025.

IT IS SO ORDERED.

Dated: June 6, 2025

SALLIE KIM
United States Magistrate Judge